Filed 7/26/19 Schur Flexibles Holding GesmbH v. Peschanskiy CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SCHUR FLEXIBLES HOLDING GESMBH et al., Plaintiffs and Appellants, v. ALLA PESCHANSKIY et al., Defendants and Respondents.	H044405 (Santa Clara County Super. Ct. No. 1-16-CV292279)

I. INTRODUCTION

Plaintiff Schur Flexibles Holding GesmbH (Schur Austria), an Austrian company, and plaintiff Schur Flexibles Moneta s.r.o. (Schur Slovakia), a Slovakian company, allege that defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy—all California residents—fraudulently inflated the value of a Slovakian packaging business that plaintiffs ultimately acquired. Plaintiffs further allege that these defendants attempted to conceal some of the proceeds from the fraud by engaging in fraudulent real estate transactions in California with the remaining defendants, Marianna Felshtiner (formerly Marianna Konnaya), Ilona Balagula, and Svetlana Goldman—all of whom are California residents except Balagula. After plaintiffs filed a complaint alleging various tort and statutory claims, defendants filed a motion for a stay or dismissal of the action under the doctrine of forum non conveniens. Defendants contended, among other

arguments, that plaintiffs' action should be heard in Slovakia. The trial court granted defendants' motion and stayed the action.

On appeal, plaintiffs contend that the trial court's ruling was erroneous because Slovakia is not a suitable forum and the public and private interest factors compel retention of the case in California. After considering the suitability of Slovakia as an alternative forum and reviewing the trial court's balancing of the requisite facts, we find no abuse of discretion and therefore must affirm the order.

II. BACKGROUND

A. *The Complaint*

According to the first amended complaint, plaintiff Schur Austria is an Austrian limited liability company. Schur Austria sought to acquire the business operations of Moneta S s.r.o. (Moneta S). Moneta S operated a packaging business in the Slovak Republic involving the printing, lamination, and assembly of plastic and aluminum foils for food, pharmaceutical, and industrial applications.

Defendant Nina Felshtiner allegedly controlled Moneta S but ceded many of her responsibilities to her two children, defendants Stanislav Felshtiner and Alla Peschanskiy. All three are residents of Santa Clara County.

These three defendants—Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy—allegedly devised a scheme to inflate Moneta S's revenue, so that they could sell Moneta S at a fraudulently inflated price. They allegedly misrepresented the company's products, customers, revenue, expenses, and sales projections.

In or about March 2013, at a meeting in Slovakia, plaintiff Schur Austria made a bid for Moneta S based on the alleged false oral and written statements by defendants Stanislav Felshtiner and Alla Peschanskiy. Further misrepresentations were allegedly made by, or at the direction of, defendants Nina Felshtiner, Stanislav Felshtiner, and/or Alla Peschanskiy at a meeting in Slovakia in May 2013; at meetings in Austria in August,

November, and December 2013; at a meeting in Sweden in November 2013; by telephone; by email; and in various written documents.

In late 2013, the three defendants—Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy—transferred Moneta S's business to another Slovakian company, Moneta Packaging SK s.r.o. (Moneta Packaging). Moneta Packaging was created as a vehicle to sell the entire business operations of Moneta S to plaintiff Schur Austria.

In December 2013, plaintiff Schur Austria agreed to purchase Moneta Packaging and entered into a sale and purchase agreement with Moneta S based on the representations concerning the value of the business. In January 2014, Schur Austria transferred all its rights and obligations under the agreement to plaintiff Schur Slovakia, a Slovakian limited liability company that was formed for the purpose of acquiring Moneta Packaging. Since the acquisition of Moneta Packaging, Schur Slovakia has continued Moneta Packaging's operations in the Slovak Republic.

In May 2014, Moneta Packaging merged into plaintiff Schur Slovakia. After the merger, Schur Slovakia allegedly discovered the fraudulent schemes to inflate the value of Moneta S, including a false revenue scheme.

After allegedly receiving money from the sale, defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy tried to hide some of the money through real estate transactions so plaintiffs would not be able to recover damages from defendants once the fraud was discovered. For example, these defendants allegedly purchased property in Santa Clara County and elsewhere in the names of defendants Marianna Konnaya (now known as Marianna Felshtiner), Ilona Balagula, or Svetlana Goldman, or had the property transferred to these latter defendants. Defendant Marianna Felshtiner is a resident of Santa Clara County and is the wife of defendant Stanislav Felshtiner. Defendant Balagula is a resident of New York City and allegedly has a "familial" relationship with the Felshtiner and Peschanskiy defendants. Defendant Svetlana Goldman is a resident of Santa Clara County and is allegedly the daughter of Mariya

Goldman, who was a shareholder of Moneta S and who allegedly has a "familial" relationship with the Felshtiner and Peschanskiy defendants.

In the first amended complaint, plaintiffs Schur Austria and Schur Slovakia allege that they were misled into purchasing Moneta Packaging at a grossly inflated price by the fraudulent scheme of defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy. Plaintiffs allege that millions of dollars in proceeds from this fraud were then laundered in an attempt to conceal the proceeds, in part, through fraudulent real estate transactions involving defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman. Plaintiffs allege the following causes of action: (1) fraud and deceit against defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy; (2) fraudulent transfer of funds and real property regarding residences in New York and in Bay Point, Brentwood, and Los Gatos, California, against all defendants; (3) aiding and abetting fraud against all defendants; (4) conspiracy to defraud against all defendants; (5) unfair competition against all defendants; (6) unjust enrichment against all defendants; and (7) conversion of money against all defendants.

B. ***Defendants' Motion to Stay or Dismiss the Action***

Defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy filed a motion to stay or dismiss the action on the ground of forum non conveniens or, in the alternative, to stay the action pending resolution of litigation in Europe. Defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman filed joinders in support of the motion.

In a declaration, defendant Stanislav Felshtiner stated that he, his sister defendant Alla Peschanskiy, and their mother defendant Nina Felshtiner are related to Mariya Goldman by marriage. Mariya Goldman and Alena Spinerova were the owners of Moneta S. Defendant Stanislav Felshtiner and his sister defendant Alla Peschanskiy helped Mariya Goldman manage her investments, including by developing and marketing new products lines for Moneta S in Slovakia.

Defendants contended that plaintiffs' civil action had "nothing to do with California," that "all the allegedly wrongful acts . . . occurred in Europe," and that California had no interest in retaining this action. They argued that plaintiff's civil action arose out of the sale of a Slovakian company (Moneta Packaging) to European plaintiffs (Schur Austria and Schur Slovakia) by a Slovakian company (Moneta S), which was owned by Alena Spinerova, a resident of Slovakia, and Mariya Goldman, a resident of Ukraine and Malta. Moneta S and plaintiff Schur Austria retained European investment bankers, accounting firms, and/or financial advisors in connection with the proposed transaction. The sale and purchase agreement was executed in Slovakia by Schur Austria and a related German company, as well as Moneta S, Alena Spinerova, and Mariya Goldman, and the agreement is governed by Slovakian law. The alleged fictitious sales by Moneta S involve a Swedish company, an Austrian company and a Bulgarian company.

Defendants contended that the documents they needed for their defense were in Europe, that the witnesses they needed for their defense resided in Europe, and that those witnesses were "not subject to compulsory process" by the California court. The witnesses included Mariya Goldman, an owner of Moneta S, from the Ukraine and Malta; Alena Spinerova, another owner of Moneta S, from Slovakia; people from accounting and financial firms in Slovakia and Switzerland; current and former employees of the Slovakian companies Moneta S and Moneta Packaging; and people from the Swedish, Austrian, and Bulgarian companies that allegedly facilitated fictitious sales. Further, documents and deposition transcripts would need to be translated from Slovakian, German, and Swedish.

Defendants contended that plaintiffs' cause of action for fraudulent transfer of California and New York property was "derivative of, and dependent upon, the fraud allegations concerning events that occurred entirely in Europe." According to defendants, the fraudulent transfer claim was "inconsequential" in scope and regarding

the evidence needed to support the claim, in comparison to the other claims arising out of events in Europe.

Defendants contended that plaintiff Schur Slovakia had initiated four separate proceedings in Europe based on the same allegations as the California action, and that there was a risk of conflicting judgments if the California action was permitted to proceed. Those four European proceedings included: (1) an arbitration against Moneta S and its owners Mariya Goldman and Alena Spinerova with the International Court of Arbitration of the International Chamber of Commerce (ICC), (2) a lawsuit against Moneta S in Slovakia, (3) a lawsuit against Mariya Goldman and Alena Spinerova in Slovakia, and (4) a claim against Mariya Goldman and Alena Spinerova in Denmark.

Defendants contended that the California action should be dismissed or stayed on the ground of forum non conveniens, and that Slovakia, the ICC, or Denmark were suitable alternative forums. In the alternative, defendants contended that the California action should be stayed until the European actions were resolved.

Regarding Slovakia as a suitable alternative forum for plaintiffs' claims, defendants provided evidence that Slovakia is a democracy, has an independent judiciary applying what American courts generally regard as due process of law, and that plaintiffs' claims against defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy regarding the sale of Moneta Packaging could be brought in Slovakia. Defendants acknowledged that the Slovakian courts would not have jurisdiction over the alleged real estate transactions in the United States, but that the Slovakian courts would have jurisdiction over claims against defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman for aiding and abetting the alleged misconduct of the other defendants that may have occurred in Slovakia. All defendants stated that they would consent to personal jurisdiction in a Slovakian court. Defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy further stated that they would waive any procedural bar, including the statute of limitations, while defendants Marianna Felshtiner, Ilona Balagula,

and Svetlana Goldman stated that they would waive any jurisdictional defense based on the applicable statute of limitations.

C. *Plaintiffs' Opposition*

In opposition to the forum non conveniens motion, plaintiffs contended that defendants failed to establish that Slovakia was a suitable alternative forum. Plaintiffs observed that defendants' expert had stated in a declaration that the Slovak courts would not exercise jurisdiction over defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman with respect to real estate transactions in the United States. Plaintiffs argued that although defendants were willing to stipulate to a Slovakian court having personal jurisdiction over them, there was no evidence that the stipulation "would be sufficient" for a Slovakian court to "actually exercise subject matter jurisdiction over the claims against [them]." Thus, these defendants' willingness to submit to the jurisdiction of the Slovakian court was "meaningless" if that court would not have subject matter jurisdiction.

Plaintiffs contended that even if a suitable alternative forum existed, defendants failed to establish that the public and private interests weighed in favor of litigating in the alternative forum rather than in California. According to plaintiffs, California was " 'presumptively a convenient forum' " for the five defendants who were California residents, as well as for the remaining defendant who owned California property that was the subject of plaintiffs' claims. Further, "some deference" must be given to plaintiffs' chosen forum even though plaintiffs were not California residents.

Plaintiffs further contended that defendants "orchestrated and carried out their scheme to defraud . . . while in California, and they returned proceeds of the fraud to California." Specifically, plaintiffs provided evidence that defendants Stanislav Felshtiner and Alla Peschanskiy were living in California during the year-long negotiations over the sale of Moneta Packaging, that defendant Peschanskiy in particular traveled between California and Europe to conduct negotiations, and that she also

conducted negotiations from within California. Plaintiffs also argued that defendants engaged in "suspicious real estate transactions," three of which involved California property, with proceeds from the Moneta Packaging transaction. Plaintiffs contended that California had a strong interest in deterring misconduct by its residents, and an interest in protecting its housing market from money laundering. Plaintiffs also argued that their claims were not based on the sale and purchase agreement, and that California law applied to their claims.

Plaintiffs further contended that a California judgment could readily be enforced against defendants, whose assets were located here, whereas a foreign judgment against defendants would necessitate the filing of a separate California action to enforce the foreign judgment.

Regarding defendants' identification of witnesses who were located outside of California, plaintiffs contended that defendants failed to establish (1) the materiality of the witnesses' testimony, and (2) whether the witnesses would be unwilling to testify in California or unwilling to testify in their home countries through a videotaped deposition. Plaintiffs stated that the entity they retained in connection with the due diligence process and post-transaction investigation (a Deloitte entity in Germany) was agreeable to cooperating with the California litigation. Plaintiffs suggested that defendants' agents during negotiations, including KPMG in Slovakia, UBS in Switzerland, and PwC in Slovakia, may likewise be cooperative. Plaintiffs contended that other witnesses were "closely affiliated" with defendants, and therefore it could not be assumed that those witnesses would not cooperate. Plaintiffs further observed that some of the witnesses identified by Defendant were located outside of California and Slovakia, and thus Slovakia was not necessarily a more convenient forum.

Plaintiffs also provided evidence that other third-party witnesses were in California, such as the email providers used by some of the defendants, and the brokers and escrow companies involved in the California real estate transactions. Plaintiffs

provided evidence that a Slovakian court would not have the ability to compel the presence of witnesses who were outside of Slovakia. On the other hand, plaintiffs provided evidence that witnesses located in Slovakia may testify by deposition, and plaintiffs stipulated to the use of videotaped depositions at trial.

Regarding the location of documents, plaintiffs contended that this was a "neutral" factor because relevant documents existed in both California and Slovakia. Plaintiffs provided evidence that many documents were available in electronic format, and therefore easily accessible in California.

Plaintiffs also provided evidence that most of the relevant documents were in English, and that most witnesses spoke English, not Slovak. Slovak courts required documents and testimony in the Slovak language. Therefore, according to plaintiffs, translator and interpreter costs would be minimized if the case remained in California. The documents in English included the transaction documents related to the sale of Moneta Packaging, the negotiations and correspondence between representatives of the sellers and buyers, including with UBS and KPMG, and emails on Moneta S servers.

Plaintiffs contended that the ICC and Denmark were also not suitable alternative forums. To the extent the trial court granted defendants' forum non conveniens motion, plaintiffs contended that certain conditions should be imposed on defendants. Plaintiffs further argued that the California action should not be stayed pending the resolution of the European actions because defendants were not parties in the European actions and the California action involved different causes of action.

D. *Defendants' Reply*

Regarding plaintiffs' cause of action for fraudulent transfer of property, defendants acknowledged that their expert "stated that the Slovakian courts may not accept subject matter jurisdiction over the real property transactions in the United States." Defendants contended, however, that "these transactions have no relevance until Plaintiffs obtain a judgment showing they were defrauded in the purchase of Moneta

Packaging, and those fraud claims . . . may be filed in Slovakia." Defendants argued that plaintiffs could pursue claims against defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy in Slovakia, and then plaintiffs could seek to enforce any judgment in California, including against the three California residences. Defendants further argued that they all agreed to submit to the jurisdiction of the Slovakian courts and to waive the statute of limitations.

E. *The Trial Court's Order Granting Defendants' Motion*

By written order filed on October 26, 2016, the trial court granted defendants' forum non conveniens motion and stayed the action, after determining that the matter should be heard in Slovakia. The court made several orders, including that defendants "consent to personal jurisdiction of the court of the Slovak Republic and waive any procedural bar, including the applicable statute of limitations." The court further ordered that if the Slovakian court dismissed claims against a defendant for lack of subject matter jurisdiction, plaintiffs could apply to the trial court to lift the stay in the California action against that defendant.

III. DISCUSSION

Plaintiffs contend that the trial court erred in granting the forum non conveniens motion, because Slovakia is not a suitable forum and the public and private interest factors compel retention of the case in California.

A. *Legal Principles*

"The doctrine of forum non conveniens is rooted in equity. It allows a court to decline to exercise its jurisdiction over a case when it determines that the case 'may be more appropriately and justly tried elsewhere.' [Citation.]" (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 203 (*Fox Factory*).) The doctrine is reflected in Code of Civil Procedure section 410.30, subdivision (a), which states, "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an

action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

"In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).)

The defendant, as the moving party, bears the burden of proof on a forum non conveniens motion. (*Stangvik, supra,* 54 Cal.3d at p. 751.) On appeal, the trial court's " 'threshold' determination—the suitability of the alternative forum—is examined de novo. [Citations.]" (*Fox Factory, supra,* 11 Cal.App.5th at p. 204.) The trial court's ultimate ruling on the motion, which requires a balancing of private and public interests, is reviewed "for abuse of discretion, and the [trial] court's ruling is entitled to 'substantial deference.' [Citation.]" (*Ibid.*) Under the abuse of discretion standard, the trial court's factual determinations are reviewed for substantial evidence. (*Stangvik, supra,* at p. 754.)

B. *Analysis*

1. Suitability of Slovakia as a forum for trial

Plaintiffs contend that the trial court erred in finding that Slovakia is a suitable alternative forum. They argue that an alternative forum is suitable only if there is personal jurisdiction and subject matter jurisdiction. Plaintiffs contend that a declaration from defendants' own expert indicates that a Slovakian court would not exercise jurisdiction over some of the defendants because those defendants' conduct did not occur in Slovakia, they are not citizens of Slovakia, and certain causes of action against them do not relate to property located in Slovakia.

Defendants contend that their stipulation to personal jurisdiction and to waive the statute of limitations is sufficient to establish Slovakia as a suitable alternative forum.

They argue that they need not demonstrate that the Slovakian court has subject matter jurisdiction with respect to litigation over California property.

In evaluating a forum non conveniens motion, the trial court must make the "threshold" determination of "whether the alternate forum is a 'suitable' place for trial." (*Stangvik, supra,* 54 Cal.3d at pp. 752, fn. 3, 751.) "The availability of a suitable alternative forum for the action is critical. . . . 'In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.' [Citation.]" (*American Cemwood Corp. v. American Home Assurance Co*. (2001) 87 Cal.App.4th 431, 435.)

" '[A] forum is suitable where an action "can be brought," although not necessarily won.' [Citations.]" (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1187 (*Hahn*).) "The law does not require that California courts become the depository for nonresident plaintiffs' cases involving causes of action which are not recognized or would not be successful in those plaintiffs' home states. Having been assured of jurisdiction over [defendants] and that there will be no statute of limitations bar, plaintiffs' remedy is to pursue their causes of action in their home forums and to persuade the trial or appellate courts there to recognize their claims." (*Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 134.)

In "rare" circumstances, an alternative forum may be unsuitable under the " 'no remedy at all' exception. In California, the 'no remedy at all' exception has been construed to apply only narrowly, 'such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law.' [Citations.]" (*Hahn, supra,* 194 Cal.App.4th at pp. 1188-1189.)

"It is well settled under California law that the moving parties satisfy their burden on the threshold suitability issue by stipulating to submit to the jurisdiction of the alternative forum and to waive any applicable statute of limitations." (*Hahn, supra,* 194

Cal.App.4th at p. 1190; see *Stangvik*, *supra*, 54 Cal.3d at p. 752.) "[W]hen the defendants meet this burden, a burden of production falls on the plaintiffs if they wish to show the alternative forum is nonetheless unsuitable because the action cannot actually be brought there despite the defendants' stipulations." (*Hahn*, *supra*, at p. 1191.) "If the plaintiffs produce competent and persuasive evidence showing that despite the defendants' stipulations the action cannot be brought in the alternative forum, it is then the defendants' burden to respond with countervailing evidence as they have the ultimate burden of persuasion. [Citation.]" (*Ibid.*) Significantly, "by staying the action rather than dismissing it, the court retains the power to verify both that the [foreign] courts accept jurisdiction of the action and that defendants abide by their stipulations. If, for any reason plaintiffs cannot bring their action in [the alternative forum], they may return to California and request that the court lift the stay. [Citations.]" (*Id.* at p. 1192.)

In contending that Slovakia is not a suitable forum, plaintiffs rely on the declaration of Ľubomír Fogaš, who was the head of the Department of Civil Law, Faculty of Law, at Commenius University in Slovakia. Defendants had filed Fogaš's declaration in support of their forum non conveniens motion. Fogaš stated the following opinions regarding the ability of plaintiffs to litigate their claims in Slovakia.

First, regarding the claims against defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy in the California action, Fogaš stated that plaintiffs may bring similar claims in a Slovakian court, and that a Slovakian court would have jurisdiction.

Second, to the extent defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman "participated in and aided and or abetted" the other defendants in implementing a fraudulent scheme in Slovakia, "there would be jurisdiction over [defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman]."

Third, Fogaš indicated that a claim may exist under Slovakian law against defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman for their alleged

participation in the transfers of the California properties to conceal income gained from the fraud on plaintiffs.

Fourth, however, Fogaš stated that "the jurisdiction of the Slovak court over [defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman] shall not be given" regarding the validity of those transfers of California property. This conclusion was based on the facts that these defendants did not reside in Slovakia, the property at issue was not located in Slovakia, and the acts undertaken by these defendants regarding the property transfers took place outside of Slovakia.

In addition to Fogaš's declaration, each defendant submitted a declaration in support of the forum non conveniens motion expressing their consent to personal jurisdiction in a Slovakian court and a waiver of the statute of limitations.

We determine that, based on defendants' declarations submitting to jurisdiction in Slovakia and waiving any applicable statute of limitations, defendants satisfied their burden on the threshold issue of the suitability of Slovakia as a forum for trial. (*Hahn, supra,* 194 Cal.App.4th at p. 1190; see *Stangvik*, *supra*, 54 Cal.3d at p. 752.) Plaintiffs therefore had the burden of production "to show the alternative forum is nonetheless unsuitable because the action cannot actually be brought there despite the defendants' stipulations." (*Hahn, supra*, at p. 1191.) Plaintiffs failed to satisfy this burden for the following reasons.

First, it is not clear whether Fogaš's references to the lack of jurisdiction refers to personal jurisdiction or subject matter jurisdiction. Second, even if Fogaš was referring to a Slovakian court's lack of subject matter jurisdiction over claims regarding the transfer of California property by defendants Marianna Felshtiner, Ilona Balagula, and Svetlana Goldman, plaintiffs did not produce evidence regarding whether a Slovakian court would still refuse to exercise jurisdiction despite defendants' consent to jurisdiction and waiver of procedural bars. We further observe that the trial court's order granting the forum non conveniens motion and staying the California action provided that: (1) each

defendant was required to consent to a Slovakian court having personal jurisdiction over him or her and waive "any procedural bar," and (2) plaintiffs could seek to lift the stay in California if a Slovakian court dismissed claims against any defendant for lack of subject matter jurisdiction. By staying the action, the trial court "retain[ed] the power to verify both that the [Slovakia] courts accept jurisdiction of the action and that defendants abide by their stipulations." (*Hahn*, *supra*, 194 Cal.App.4th at p. 1192.) On this record, plaintiffs fail to demonstrate that the trial court erred in determining that Slovakia was a suitable forum for trial.

2. Private and public interests

After determining that a suitable alternate forum is available, the trial court must "consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) "The court can also take into account the amenability of the defendants to personal jurisdiction, the convenience of witnesses, the expense of trial, the choice of law, and indeed any consideration which legitimately bears upon the relative suitability or convenience of the alternative forums. [Citations.]" (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 860 (*Archibald*).)

In this case, the factors relevant to balancing the private interests of the parties and the public interests do not clearly favor California.

Regarding the residence of the parties, one plaintiff is an Austrian company, and the other plaintiff is a Slovakian company. For a corporation, the state of incorporation or the principal place of business is presumptively a convenient forum. (*Stangvik*, *supra*, 54 Cal.3d at p. 755.) Plaintiffs nevertheless contend that they are residents of the United States (but not California) because their "ultimate parent company" is based in New York. Plaintiffs do not provide legal authority for the proposition that a parent company's location applies to a subsidiary. Further, where the plaintiffs are residents of a foreign country, "the fact that plaintiffs chose to file their complaint in California is not a substantial factor in favor of retaining jurisdiction here." (*Ibid.*, fn. omitted; accord, *Fox Factory*, *supra*, 11 Cal.App.5th at p. 205 ["the forum choice of a *foreign* plaintiff is not entitled to a presumption of convenience"].) In addition, although five of the six defendants are California residents, a "[California] defendant may overcome the presumption of convenience by evidence that the alternate jurisdiction is a more convenient place for trial of the action." (*Stangvik*, *supra*, at p. 756, fn. omitted.)

There was evidence that relevant documents and witnesses were scattered in various locations, including in California, Slovakia, and other primarily European countries. There was also evidence that many documents were available in electronic format. To the extent compulsory process is not available for the attendance of unwilling witnesses, it is not clear whether more witnesses having material testimony would voluntarily appear at trial in California as compared to Slovakia, or whether more depositions of witnesses with material testimony could be compelled in one forum as compared to the other. Defendants Nina Felshtiner, Stanislav Felshtiner, and Alla Peschanskiy each stated in declarations that it would impose an "enormous financial and logistical burden" on them to bring witnesses to California "even assuming that the witnesses would agree to travel here."

Plaintiffs contend that defendants failed to demonstrate the materiality of testimony from potential defense witnesses. Defendants, however, provided a declaration

from an attorney from the Slovakian law firm defending Moneta S, Mariya Goldman, and Alena Spinerova in the arbitration and in the Slovakian legal actions filed by plaintiff Schur Slovakia. These foreign proceedings all pertained to Schur Slovakia's acquisition of Moneta Packaging and the allegation that Schur Slovakia paid an inflated value for the packaging business, as well as the allegation that there were misrepresentations or omissions. Although the arbitration[1] and Slovakian actions involve different defendants than the California case, the Slovakian attorney stated that, based on his review of the first amended complaint in the California action, the allegations in all the proceedings were "very similar." He also identified the "critical" defense witnesses in the foreign proceedings, including Mariya Goldman, Alena Spinerova, current and former employees of Moneta S and Moneta Packaging, the European accounting and financial firms involved in the acquisition, and the European companies supposedly involved in the fictitious sales. The Slovakian attorney indicated his "assum[ption]" that the same witnesses would be critical to the defense in the California action, and defendants Stanislav Felshtiner and Alla Peschanskiy confirmed in their respective declarations that those witnesses were critical to their defense. Plaintiffs argue on appeal that those witnesses would not be relevant to the fraud claims against defendants Stanislav Felshtiner and Alla Peschanskiy. In view of the declarations from the Slovakian attorney and defendants Stanislav Felshtiner and Alla Peschanskiy, the trial court's implied,

---

[1] Plaintiffs have requested judicial notice of an April 17, 2018 final arbitration award issued by the ICC. The arbitration award was issued nearly 18 months after the trial court's order granting defendants' forum non conveniens motion. We will deny plaintiff's request for judicial notice. "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Further, plaintiffs seek judicial notice of the award in order to rely on factual findings in the award. However, "a court may not take judicial notice of the *truth* of a factual finding made in another [forum]. [Citation.]" (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749.)

contrary determination "is supported by substantial evidence, and we defer to its conclusion." (*Stangvik, supra,* 54 Cal.3d at p. 754.)

There was evidence that many relevant documents are in English and that many witnesses speak English, not Slovak, so translation and interpreter costs may be less if plaintiffs litigated their claims in California. Further, a judgment from California could be enforced against a defendant's assets located in California, rather than necessitating a separate California action to enforce a foreign judgment.

Regarding the public interests in retaining the action in California, plaintiffs contend that defendants conceived of their fraudulent scheme in California and committed overt acts in California in furtherance of their fraudulent scheme. Plaintiffs state that defendants Stanislav Felshtiner and Alla Peschanskiy were California residents during negotiations, and that Alla Peschanskiy generated some emails from California. Plaintiffs also contend that defendants returned the proceeds of the fraud to California through fraudulent transfers of California property. Plaintiffs argue that California has a strong interest in deterring misconduct by its residents. Indeed, a "jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum." (*Stangvik, supra,* 54 Cal.3d at p. 753, fn. 4.)

On the other hand, defendants' wrongdoing allegedly pertained to the sale of the packaging business of Moneta S and Moneta Packaging, both of which are Slovakian companies. The face-to-face meetings and negotiations took place outside of the United States, and the meetings in Slovakia included alleged misrepresentations about the Moneta S business. The purchase and sale agreement was ultimately executed in Slovakia, and plaintiffs were allegedly defrauded out of millions of dollars in connection with their acquisition of the Slovakian business. The "jurisdiction with the greater interest" in the trial of the action "should bear the burden of entertaining the litigation. [Citation.]" (*Stangvik, supra,* 54 Cal.3d at p. 757.) Plaintiffs do not provide authority

supporting the proposition that California would have a greater interest than Slovakia in defendants' allegedly fraudulent scheme, even considering that a portion of the proceeds from the sale allegedly flowed back to California. Indeed, "California courts . . . have little or no interest in litigation involving injuries incurred outside of California by nonresidents. It seems unduly burdensome for California residents to be expected to serve as jurors on a case having so little to do with California." (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 760; accord, *Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1467.)

Plaintiffs contend that their fraud case is governed by California law. Plaintiffs' analysis, however, is based on the fact their action was filed in California and includes some California statutory claims. Plaintiffs fail to establish that California law would apply to claims in an action filed in Slovakia. To the contrary, the declaration from Fogaš, from Commenius University in Slovakia, indicates that an action filed by plaintiffs in Slovakia would include claims under Slovakian law.

"[T]he trial court retains a flexible power to consider and weigh all factors relevant to determining which forum is the more convenient, and to stay actions . . . when it finds that the foreign forum is preferable." (*Archibald*, *supra*, 15 Cal.3d at p. 860.) "[T]he private and public interest factors must be applied flexibly, without giving undue emphasis to any one element." (*Stangvik*, *supra*, 54 Cal.3d at p. 753.) A trial court will be found to have abused its discretion in weighing the facts only if " 'no judge could have reasonably reached the challenged result. [Citation.] "[A]s long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be . . . set aside.' " ' " (*Guimei v. General Elec. Co.* (2009) 172 Cal.App.4th 689, 696.) Here, both sets of parties may suffer inconvenience and expense from litigating the case in the forum preferred by the other side. But as the California Supreme Court made clear in *Stangvik*, *supra*, at page 763, "these problems are implicit in many cases in which forum non conveniens motions are made, and it is for the trial

court to decide which party will be more inconvenienced." Because the balancing in this case does not clearly favor California, we must defer to the trial court's discretionary decision according more weight to the factors favoring Slovakia. Consequently, we find no abuse of discretion in the trial court's decision to stay the California action.

Lastly, plaintiffs contend that the trial court abused its discretion by failing to include in the order a requirement that defendants " 'agree[] to satisfy any foreign judgment, without challenging the enforceability of such a judgment.' " In support of this contention, plaintiffs cite *Carijano v. Occidental Petroleum Corp.* (9th Cir. 2011) 643 F.3d 1216 (*Carijano*). In that case, the Ninth Circuit Court of Appeals observed that "California generally enforces foreign judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process. [Citation.]" (*Id.* at pp. 1231-1232.) In *Carijano*, there was evidence that the alternative forum, Peru, had "disorder in [its] judiciary," which made a Peruvian judgment subject "to attack . . . on due process grounds under California's foreign judgments statute." (*Id.* at p. 1232.) The federal district court did not require the defendant to agree that a Peruvian judgment could be enforced against the defendant in the United States, as a condition of dismissal on a forum non conveniens motion. The Ninth Circuit Court of Appeals concluded that "[t]he private factor of the enforceability of judgments thus weigh[ed] against dismissal." (*Ibid.*) In this case, plaintiffs fail to point to any evidence suggesting that a Slovakian judgment would be susceptible to a similar attack as a Peruvian judgment. Moreover, defendants provided a declaration from a Stanford law professor who opined that Slovakia has "an independent judiciary and adhere[s] generally to what the United States considers to be due process of law." We conclude that the trial court did not err in refusing to include in its order a requirement that defendants agree to satisfy any foreign judgment without challenging the enforceability of the judgment. In reaching this conclusion, we express no opinion on the merits of any challenge by a defendant to the enforceability of a foreign judgment.

IV. DISPOSITION

Plaintiffs' August 10, 2018 request for judicial notice is denied.

The trial court's October 26, 2016 order granting the forum non conveniens motion and staying the action is affirmed. The parties shall bear their own costs on appeal.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.

Schur Flexibles Holding v. Peschanskiy
H044405